

**NOT FOR CITATION**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL W. BRISENO,  
Petitioner,

No. C 04-1458 PJH

**ORDER DENYING STATE'S MOTION TO  
DISMISS HABEAS PETITION AS  
UNTIMELY AND REINSTATING  
BRIEFING SCHEDULE<sup>1</sup>**

v.

JEANNE S. WOODFORD, Director,  
California Dept. Of Corrections,  
Respondent.

Petitioner Michael W. Briseno ("Briseno"), currently in the custody of the California Department of Corrections, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 with this court on April 14, 2004. The state moved to dismiss the petition as untimely. After considering the parties' briefs, the record, exhibits, and relevant authorities, this court DENIES the state's motion to dismiss.

**BACKGROUND**

The relevant facts are not in dispute. On May 12, 2000, the Santa Clara County Superior Court sentenced Briseno to a determinate term of nine years and four months in prison, to be followed by a consecutive indeterminate term of 210 years to life following his guilty plea to thirty-two felony counts of sexual misconduct with children. Briseno filed both direct appeals and petitions for habeas relief before the state appellate courts. On September 23, 2002, the California Court of Appeal dismissed Briseno's direct appeal, and also denied his petition for state habeas relief. The California Supreme Court denied

<sup>1</sup> Pursuant to Civil Local Rule 7-13, this order may not be cited except as provided by Civil Local Rule 3-4(e).

Briseno's petition for review of the direct appeal on November 26, 2002, and denied review of his state habeas petition on January 15, 2003. Briseno filed the instant petition for federal habeas relief with this court on April 14, 2004.

## DISCUSSION

### I. Timeliness

AEDPA requires that an application for a writ of habeas corpus be made during the one-year statute of limitations period. 28 U.S.C. § 2244(d)(1). The one-year period generally will run from "the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). "Direct review" includes the period within which a petitioner can file a petition for writ of certiorari from the United States Supreme Court, whether or not the petitioner actually files such a petition. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9<sup>th</sup> Cir. 1999). Accordingly, if a petitioner fails to seek a writ of certiorari from the United States Supreme Court following conclusion of direct review, AEDPA's one-year limitations period begins to run ninety days later, when the period for seeking such a writ expires. See *Miranda v. Castro*, 292 F.3d 1063, 1065 (9<sup>th</sup> Cir. 2002).

However, AEDPA's one-year statute of limitations is tolled under § 2244(d)(2) for the "time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *Dictado v. Ducharme*, 244 F.3d 724, 726 (9<sup>th</sup> Cir. 2001). An application for collateral review is "pending" in state court "as long as the ordinary state collateral review process is 'in continuance' – *i.e.*, 'until completion of' that process." *Carey v. Saffold*, 536 U.S. 214, 219-220 (2002). In California, this means that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge." *Id.*; accord *Nino v. Galaza*, 183 F.3d 1003, 1006 (9<sup>th</sup> Cir. 1999). However, in the case of state collateral relief, unlike direct review, the limitation period *is not* tolled under § 2244(d)(2) while a petition for certiorari from a state court's denial of a petition for post-conviction relief is pending in the United States Supreme Court or during the ninety days in which such a petition

1 may be filed. *White v. Klitzkie*, 281 F.3d 920, 924 (9<sup>th</sup> Cir. 2002).

2 Here, AEDPA's one-year statute of limitations period would have commenced on  
3 February 25, 2003, ninety days after the California Supreme Court denied Briseno's petition  
4 for review on direct appeal – the time in which Briseno could have filed a petition for writ of  
5 certiorari with the United States Supreme Court.<sup>2</sup> See *Miranda*, 292 F.3d at 1065. It,  
6 therefore, would have expired on February 25, 2004, one year later. Briseno, however, did not  
7 file the instant petition with this court until April 14, 2004 – forty-nine days late.

## 8 **II. Briseno is Entitled to Equitable Tolling**

9 The one-year limitation period can be equitably tolled because § 2244(d) is a statute of  
10 limitations and not a jurisdictional bar. *Calderon v. United States District Court (Beeler)*, 128  
11 F.3d 1283, 1288 (9<sup>th</sup> Cir. 1997). "When external forces, rather than a petitioner's lack of  
12 diligence, account for the failure to file a timely claim, equitable tolling of the statute of  
13 limitations may be appropriate." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9<sup>th</sup> Cir. 1999).  
14 Equitable tolling will not be available in most cases because extensions of time should be  
15 granted only if "extraordinary circumstances beyond a prisoner's control make it impossible to  
16 file a petition on time." *Beeler*, 128 F.3d at 1288 (citation and internal quotation marks  
17 omitted). The prisoner must show that "the 'extraordinary circumstances' were the cause of  
18 his untimeliness." *Spitsyn v. Moore*, 345 F.3d 796, 799 (9<sup>th</sup> Cir. 2003). Where a prisoner  
19 fails to show "any causal connection" between the grounds upon which he asserts a right to  
20 equitable tolling and his inability to timely file a federal habeas application, the equitable tolling  
21 claim will be denied. *Gaston v. Palmer*, 387 F.3d 1004, 1008-09 (9<sup>th</sup> Cir. 2004) (holding that  
22 where prisoner fails to show causal connection between self-representation on direct appeal  
23 or physical and mental disabilities and inability to timely file petition, district court's finding that  
24 he was not entitled to equitable tolling where he had earlier filed a state habeas petition was  
25 not clear error).

26 Although ordinary attorney negligence will not justify equitable tolling, the Ninth Circuit

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28 <sup>2</sup>The state appears to have miscalculated the pertinent dates by one day.

1 has held that there are instances in which an attorney's failure to take necessary steps to  
2 protect his client's interests is so egregious and atypical that the court may deem equitable  
3 tolling appropriate. *Spitsyn*, 345 F.3d at 800 (noting also that court "ha[s] acknowledged that  
4 where an attorney's misconduct is sufficiently egregious, it may constitute an 'extraordinary  
5 circumstance' warranting equitable tolling of AEDPA's statute of limitations"). In *Spitsyn*, the  
6 Ninth Circuit held that an attorney's conduct "was so deficient as to distinguish it from the  
7 merely negligent performance of counsel" for which no equitable tolling was available, where:

8        Though he was hired nearly a full year in advance of the [AEDPA] deadline,  
9        counsel completely failed to prepare and file a petition. *Spitsyn* and his mother  
10       contacted [counsel] numerous times, by telephone and in writing, seeking  
11       action, but these efforts proved fruitless. Furthermore, despite a request that he  
12       return *Spitsyn's* file, [counsel] retained it for the duration of the limitations period  
13       and more than two months beyond.

14 345 F.3d 801.

15       This court finds Briseno's attorney's conduct in this case similarly atypical and  
16       egregious, beyond merely negligent performance. In support of his opposition to the state's  
17       motion to dismiss, Briseno has submitted a declaration from Robert DePillis, a non-inmate  
18       acquaintance of Briseno's, who acted on behalf of Briseno in securing funds for an attorney to  
19       represent Briseno in connection with a federal habeas petition, in collecting and compiling  
20       Briseno's relevant documents, and in locating and assisting in the hiring of counsel to  
21       represent Briseno. Briseno has also submitted a declaration from Attorney A.J. Kutchins, who  
22       agreed to represent and file Briseno's federal habeas petition.

23       Briseno corresponded with DePillis while in prison beginning in June 2003,  
24       approximately 8-9 months before the statute of limitations expired in this case. DePillis, in  
25       turn, corresponded with Briseno's appointed state court attorney, and as a result, began to  
26       question Briseno's competence. DePillis began assisting Briseno in raising funds for an  
27       attorney and securing representation. He collected approximately \$20,000 towards Briseno's  
28       legal fees over a period of two months from June - August 2003, and met with and hired  
29       attorney Kutchins on Briseno's behalf in August 2003, approximately six months prior to the  
30       AEDPA deadline.

1 Kutchins attests that he spent only an hour or two in August 2003 reviewing Briseno's  
2 files, and mistakenly concluded that the deadline expired on April 15, 2004 instead of  
3 February 25, 2004 – ninety days after the California Supreme Court denied review on  
4 Briseno's state *habeas* petition. Kutchins further attests that he "did nothing else on Mr.  
5 Briseno's case over the next five months," "did not do any legal research in connection with  
6 calculating the statute of limitation for filing Mr. Briseno's petition," and "did not order any  
7 transcripts of his state court proceedings." This inaction occurred in spite of the fact that  
8 Kutchins received numerous calls and letters from Briseno, DePillis, and other friends and  
9 relatives regarding Kutchins' progress on Briseno's case, and that at least two of these  
10 inquiries were specifically related to the statute of limitations. It was only after DePillis again  
11 requested Kutchins to "doublecheck" the deadline in March 2004, that Kutchins realized that  
12 the deadline had already passed. Kutchins then returned the retainer and withdrew from the  
13 case.

14 The state argues that Kutchins' conduct was "mere negligence" in calculating the  
15 AEDPA deadline, and compares this case to *Miranda*, 292 F.3d 1063. However, *Miranda* is  
16 distinguishable. In *Miranda*, the petitioner's attorney, who had been serving as his appointed  
17 counsel on his direct appeal before the state courts, mistakenly advised him in a letter  
18 regarding the statute of limitations. *Id.* at 1067-68. In holding that this did not constitute  
19 "extraordinary circumstances" warranting equitable tolling, the Ninth Circuit noted that the  
20 attorney was no longer representing the petitioner in *Miranda* at the time that she wrote the  
21 letter. *Id.* at 1068. Instead, she "generously offered some final thoughts – which apparently  
22 included a miscalculated due date, or at least a typo – in a letter after the close of her  
23 representation." *Id.* Accordingly, the Ninth Circuit noted that "Miranda had no right to that  
24 advice." *Id.* The other case cited by the state, *Frye v. Hickman*, is similarly distinguishable.  
25 See 273 F.3d 1144, 1146 (9<sup>th</sup> Cir. 2001).

26 Instead, like *Spitsyn*, Kutchins' "conduct was so deficient as to distinguish it from the  
27 merely negligent performance of counsel in *Frye* and *Miranda*." 345 F.3d at 801. Kutchins  
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1 was in fact representing Briseno at the time that he sat on Briseno's case for nearly six months  
2 and conducted no legal or factual research. Moreover, Kutchins did no further investigation in  
3 spite of numerous inquiries from Briseno and his friends and family, and in spite of the fact that  
4 Kutchins himself also had concerns regarding Briseno's mental competence, based in part on  
5 his communications with Briseno's former state counsel, DePillis, and on his own contacts  
6 and correspondence with Briseno. Kutchins did not withdraw from the case until after the  
7 statute of limitations had expired.

8 Moreover, the record demonstrates that Briseno exercised reasonable diligence in  
9 pursuing the matter, with the assistance of DePillis. See *Miles*, 187 F.3d at 1107.

### 10 CONCLUSION

11 For the reasons set forth above, this court DENIES the state's motion to dismiss  
12 Briseno's petition as untimely, and concludes that Briseno is entitled to equitable tolling from  
13 the date the statute of limitations expired until the filing of the instant petition. Accordingly, the  
14 parties shall resume briefing on the merits of Briseno's habeas petition.

15 Respondents shall file with the court and serve on petitioner, within 30 days of the date  
16 of this order, an answer conforming in all respects to Rule 5 of the Rules Governing Section  
17 2254 Cases, showing cause why a writ of habeas corpus should not be issued. Respondent  
18 shall file with the answer and serve on petitioner a copy of all portions of the administrative  
19 record that are relevant to a determination of the issues presented by the petition.

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23 If the petitioner wishes to respond to the answer, he shall do so by filing a traverse with  
24 the court and serving it on respondent within 30 days of his receipt of the answer.

25 **IT IS SO ORDERED.**

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27 Dated: April\_\_\_\_, 2005

**United States District Court**  
For the Northern District of California

PHYLLIS J. HAMILTON  
United States District Judge

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